Allied Physics Sdn Bhd v Ketua Audit Negara (Malaysia) & Anor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-01–146–05 OF 2014, W-02–810–05 OF 2014, W-02–811–05 OF 2014, W-02–812–05 OF 2014 AND W-02–813–05 OF 2014
BALIA YUSOF, HAMID SULTAN AND VERNON ONG JJCA
20 OCTOBER 2015

Tort — Defamation — Meaning of words — Appellant made reports on General Electric PET-CT Scanner for public hospital — Auditor general ('AG') prepared and released AG's report on the report prepared by appellant — Newspaper publications published AG's report — Appellant contended report defamatory of appellant — Whether words complained of capable of bearing defamatory meaning — Whether words complained of in fact defamatory

The appellant was the holder of a Class H license and was registered with the Atomic Energy Licensing Board to carry out quality checks, certification, testing and commissioning of ionising radiation equipment and its facilities. The appellant was engaged by General Electric International to prepare reports on testing and commissioning of its General Electric PET-CT Scanner at the Putrajaya Hospital and Pulau Pinang Hospital. The reports were subsequently submitted to the Ministry of Health for technical compliance and commercial compliance. The reports were audited by the auditor general ('the AG') and was released and distributed to various newspapers in the country. Newspaper articles referring to the AG's report were published to the public by *The New Straits Times*, *Guan Ming Ribao Daily*, *Berita Harian* and *Sin Chew Daily* ('the respondents'). In the report, amongst other things, the AG stated that the appellant did not have the requisite license to certify the quality and safety of PET-CT scans. It was also stated that the certificate of authentication of the quality and safety of the PET-CT scan produced by the appellant was questionable. Pursuant to this report, the appellant brought an action for defamation against the respondents in five separate actions in the trial court. The trial court however dismissed the claims, hence this appeal. The issues were whether the words complained of were capable of bearing a defamatory meaning and if the answer was affirmative, whether the words complained of were in fact defamatory.

Held, dismissing the appeals with costs:

(1) The test of reasonableness is an objective test and it is whether, under the circumstances in which the words were published, reasonable men whom the publication was made, would be likely to understand it in a

defamatory or libelous sense. The words are to be taken in the sense that it is most natural and obvious. The ordinary and natural meaning may include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words. Further, the context and circumstances of the publication must be taken into consideration, not only the actual words used (see paras 29 & 31–32).

(2) The keyword from the extraction of the AG's report was that the certificate of authentication of the quality and safety of the PET-CT scan produced by the appellant was questionable ('boleh dipertikaikan'). The opinion of the AG was premised on the finding that the appellant did not have the requisite license to certify the quality and safety of PET-CT scans. In the light of the finding, the AG would be remiss in the discharge of his duties if the AG had omitted to state that fact in his audit report. The reports pertaining to the AG's report published by the respondents should also be read within the context and circumstances of the publication. There was nothing in the AG's report and the newspaper publications which were capable of bearing a defamatory meaning (see paras 35–36).

[Bahasa Malaysia summary

Perayu merupakan pemegang lesen Kelas H dan telah berdaftar dengan Lembaga Pelesenan Tenaga Atom untuk menjalankan pemeriksaan kualiti, pengesahan, pengujian dan pentauliahan mengionkan peralatan radiasi dan kemudahannya. Perayu telah dilantik oleh General Electric International untuk menyediakan laporan mengenai pengujian dan pentauliahan General Electric PET-CT Scanner itu di Hospital Putrajaya dan Hospital Pulau Pinang. Laporan itu kemudiannya diserahkan kepada Kementerian Kesihatan untuk pematuhan teknikal dan pematuhan komersial. Laporan itu telah diaudit oleh ketua audit negara ('KAN') dan telah dikeluarkan dan diedarkan kepada pelbagai akhbar di negara ini. Keratan akhbar yang merujuk kepada laporan ketua audit negara telah diterbitkan kepada umum oleh *The New Straits Times*, *Guan Ming Ribao Daily*, *Berita Harian* dan *Sin Chew Daily* ('suratkhabar'). Dalam laporan itu, antara lain, KAN telah menyatakan bahawa perayu tidak mempunyai lesen yang diperlukan untuk mengesahkan kualiti dan keselamatan pengimbasan PET-CT. Ia juga menyatakan bahawa perakuan pengesahan kualiti dan keselamatan pengimbasan PET-CT dihasilkan oleh perayu boleh dipersoalkan. Menurut laporan ini, perayu telah memulakan tindakan untuk fitnah terhadap responden dalam lima tindakan yang berasingan di mahkamah perbicaraan. Mahkamah perbicaraan bagaimanapun menolak tuntutan-tuntutan tersebut, justeru rayuan ini. Isu-isu adalah sama ada kata-kata yang diadukan mampu membawa maksud fitnah dan jika jawapannya adalah ya, sama ada kata-kata yang diadukan itu sebenarnya berunsur fitnah.

Diputuskan, menolak rayuan dengan kos:

(1) Ujian kemunasabahan ialah ujian objektif dan ia adalah sama ada, di bawah keadaan di mana kata-kata itu diterbitkan, orang yang munasabah yang mana penerbitan itu dibuat, mungkin akan memahami ia berunsur fitnah atau fitnah bertulis. Kata-kata tersebut hendaklah diambil untuk bermaksud dalam bentuk yang paling semula jadi dan jelas. Maksud biasa dan semula jadi itu boleh termasuklah apa-apa implikasi atau inferens yang mana pembaca yang munasabah tidak dipandu oleh apa-apa yang istimewa tetapi hanya dengan pengetahuan am dan tidak terikat oleh mana-mana peraturan undang-undang yang ketat akan timbul daripada kata-kata tersebut. Selanjutnya, konteks dan keadaan penerbitan itu perlu diambil kira, bukan sahaja kata-kata sebenar yang digunakan (lihat perenggan 29 & 31–32).

(2) Kata kunci daripada pengekstrakan laporan ketua audit negara adalah bahawa perakuan pengesahan kualiti dan keselamatan pengimbasan PET-CT dihasilkan oleh perayu boleh dipertikaikan. Pendapat KAN adalah berdasarkan dapatan bahawa perayu tidak mempunyai lesen yang diperlukan untuk mengesahkan kualiti dan keselamatan pengimbasan PET-CT. Dengan mengambil kira dapatan itu, KAN akan lalai dalam menjalankan tugasnya jika KAN telah ditinggalkan daripada menyatakan fakta itu dalam laporan audit. Laporan berkaitan dengan laporan KAN yang diterbitkan oleh responden juga perlu dibaca dalam konteks dan keadaan penerbitan. Tiada apa-apa dalam laporan KAN dan penerbitan akhbar yang mampu membawa maksud fitnah (lihat perenggan 35–36).]

Notes

For cases on meaning of words, see 12(1) *Mallal's Digest* (5th Ed, 2015) paras 812–817.

Cases referred to

Abdul Rahman bin Mamat lwn Zakaria bin Senik dan lain-lain [2002] 7 MLJ 34, HC (refd)

Ayob bin Saud v TS Sambanthamurthi [1989] 1 MLJ 315, HC (refd)

Capital and Counties Bank Ltd v George Henty & Sons (1882) 7 App Cas 741, HL (refd)

Chok Foo Choo @ Chok Kee Lian v The China Press Bhd [1999] 1 MLJ 371; [1999] 1 CLJ 461, CA (refd)

Drummond-Jackson v British Medical Association and others [1970] 1 All ER 1094, CA (refd)

Gillick v Brooke Advisory Centre [2001] EWCA Civ 1263, CA (refd)

Gordon Berkeley Jones v Clement John Skelton [1963] 1 WLR 1362, PC (refd)

Jeynes v News Magazines Ltd and another [2008] EWCA Civ 130, CA (refd)

Keluarga Communication v Normala Samsudin [2006] 2 MLJ 700, CA (refd)

Kian Lup Construction v HongKong Bank Malaysia Bhd [2002] 7 MLJ 283, HC (refd)
Lee Kuan Yew v JB Jeyaretnam [1979] 1 MLJ 281 (refd)
Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd [1963] 2 All ER 151, HL (refd)
Lord William Nevill v The Fine Art and General Insurance Company, Limited [1897] AC 68; 61 JP 500 ; 66 LJQB 195, HL (refd)
Morgan v Odhams Press Ltd and another [1971] 2 All ER 1156, HL (refd)
Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors [1999] 3 MLJ 529; [1999] 8 CLJ 499, HC (refd)
The Institute of Commercial Management United Kingdom v The New Straits Times Press (Malaysia) Bhd [1992] MLJU 80; [1993] 2 CLJ 365, HC (refd)

Legislation referred to

Atomic Energy Licensing Act 1984 ss 13(2), 40
Audit Act 1957 ss 5, 6, 6(d), 7, 9
Radiation Protection (Licensing) Regulations 1986 reg 12
Federal Constitution arts 106, 107

Appeal from: Suit Nos S-21–57 of 2009, S-23–14 of 2009, S-23–15 of 2009, S-23–16 of 2009 and S-23–17 of 2009 (High Court, Kuala Lumpur)

T Sudhar (Edward Kuruvilla and Lim Zi-Han with him) in Civil Appeal Nos W-01–146–05 of 2014, W-02–810–05 of 2014, W-02–811–05 of 2014, W-02–812–05 of 2014 and W-02–813–05 of 2014 for the appellant.
Zureen Ellina bt Md Dom (Nurul Ainy bt Yahya with her) (Federal Counsels, Attorney General's Chambers) in Civil Appeal Nos W-01–146–05 of 2014 and W-02–812–05 of 2014 for the respondants.
Harjinder Kaur (Farhan Ghani with her) (Shahrizat Rashid & Lee) in Civil Appeal No W-02–811-05/2014 for the respondent.
Yiew Voon Lee (CH Yeoh & Yiew) in Civil Appeal Nos W-02–812–05 of 2014 and W-02–813–05 of 2014 for the respondents.

Vernon Ong JCA:

INTRODUCTION

[1] The five appeals herein relate to a decision of the High Court given on 31 January 2014 after a full trial dismissing the plaintiff's claims for damages for defamation against the Auditor General of Malaysia ('Appeal No 146'), The New Straits Times Press (M) Bhd ('Appeal No 810'), Guang Ming Ribao Sdn Bhd ('Appeal No 811'), Berita Harian ('Appeal No 812') and Sin Chew Media Corp Bhd ('Appeal No 813').

[2] On 20 June 2014, the Court of Appeal ordered that the five appeals to be consolidated and heard together. In this judgment the parties shall be referred to as they were in the court below.

THE SALIENT FACTS

[3] The plaintiff is in the business of carrying out quality control ('QC') tests on X-ray machines, CT scanners and X-ray machine operators.

[4] The plaintiff was at the material time the holder of a Class H licence and is registered with the Atomic Energy Licensing Board ('AELB') to carry out, amongst other things, quality checks, certification, testing and commissioning of ionising radiation equipment and its facilities as required by the Atomic Energy Licensing Act 1984 ('Act 304').

[5] In 2006, the plaintiff was engaged by General Electric International to prepare the following reports:

(a) report on testing and commissioning General Electric PET-CT Scanner at Putrajaya Hospital;

(b) QC testing and commissioning for computed tomography at Putrajaya Hospital;

(c) performance testing and commissioning of one unit of general electric PETtrace Cyclotron at Putrajaya Hospital; and

(d) report on testing and commissioning General Electric PET-CT Scanner at Pulau Pinang Hospital.

[6] The aforesaid testing and commissioning reports were subsequently submitted by the plaintiff's clients to the Ministry of Health ('MOH') for technical compliance and commercial compliance.

[7] On or about 29 August 2008, the auditor general published the following documents:

(a) a report prepared in the national language entitled 'Laporan Ketua Audit Negara Tahun 2007 — Aktiviti Kementerian/Jabatan dan Pengurusan Syarikat Kerajaan Persekutuan' ('the AG's report'); and

(b) a synopsis of the AG's report prepared in the English language entitled 'Auditor General's Report 2007 — Synopsis Auditor General's Report on the Activities of Federal Government Ministries/Departments 2007' ('synopsis of AG's report').

[8] On or about 29 August 2008, the auditor general released and distributed the AG's report to various newspapers in the country. A press release was posted by the auditor general on the official website of National Audit Department.

[9] Newspaper articles referring to the AG's report or the synopsis of the AG's report were published to members of the public by *The New Straits Times*, *Guan Ming Ribao Daily*, *Berita Harian* and *Sin Chew Daily*.

[10] The publications complained of concerning the plaintiff are set out below. The impugned words in question are:

Appeal No 146 — Auditor General of Malaysia

(at p xxxii of the AG's report)

> Selain itu, syarikat yang dilantik oleh kontraktor untuk membuat pengesahan terhadap kualiti dan keselamatan PET CT Scan tidak mempunyai lesen di bawah bidang berkaitan mengikut kehendak Seksyen 13(2) Akta Pelesenan Tenaga Atom (Akta 304).

(English translation)

> Besides this, the company appointed by the contractor to verify the quality and safety of PET CT Scan has no licence in the related field according to Section 13(2) of the Atomic Energy Licence Act (Act 304).

(at p 478 of the AG's report)

> 20.4.6.4. Seksyen 13(2) Akta Perlesenan Tenaga Atom (Akta 304) menetapkan hanya orang yang berkelayakan dan yang mempunyai lesen sahaja boleh menggunakan bahan radioaktif, nuclear atau radas penyinaran. Semakan Audit mendapati Syarikat Allied Physics Sdn Bhd yang di lantik oleh pihak kontraktor untuk membuat pengesahan terhadap kualiti dan keselamatan PET CT Scan tidak mempunyai lesen di bawah bidang berkaitan. Pada pandangan Audit, selaras dengan Seksyen 13(2) Akta 304, perakuan pengesahan terhadap kualiti dan keselamatan PET CT Scan yang dibuat oleh Syarikat Allied Physics Sdn Bhd boleh dipertikaikan. Oleh itu, Kementerian sepatutnya mengarahkan kontraktor melantik syarikat yang berkalayakan untuk membuat perakuan tersebut.

(English translation)

> 20.4.6.4. Section 13(2) of the Atomic Energy Licensing Act (Act 304) provides that only persons and qualified and licensed are entitled to handle radioactive material, nuclear material or irradiating apparatus. The Auditor's investigation reveals that Allied Physics Sdn Bhd which was appointed by the contractor to verify the quality and safety of the PET CT Scan has no licence in the related field. In the Auditor's opinion, in line with s 13(2) of Act 304, the validity of the certification of quality and safety of the PET CT Scan by Allied Physics Sdn Bhd is questionable. Therefore, the Ministry of Health should direct that the

contractor appoint a company which is qualified to carry out the said certification.

(at p 24 of the synopsis of the AG's report)

Selain itu, syarikat yang dilantik oleh kontraktor untuk membuat pengesahan terhadap kualiti dan keselamatan PET CT Scan tidak mempunyai lesen di bawah bidang berkaitan mengikut kehendak Seksyen 13(2) Akta Perlesenan Tenaga Atom (Akta 304).

(English translation)

Besides this, the company appointed by the contractor to verify the quality and safety of PET CT Scan has no licence in the related field according to Section 13(2) of the Atomic Energy Licensing Act (Act 304).

Appeal No 810 — The New Straits Times

In addition, Syarikat Allied Physics Sdn Bhd, the company subcontracted by Glotel to certify the quality and safety of the PET CT Scan, was not qualified or licensed to handle radioactive material and X-ray equipment, as required under Section 13(2) of the Atomic Energy Licensing Act.

The report said that Globel's subcontractor, Syarikat Allied Physics Sdn Bhd, was also not qualified or licensed to handle radioactive material and X-ray equipment.

Appeal No 811 — Guang Min Ribao Daily

(English translation)

Tan Sri Dato' Ambrin stated that, as Allied Physics Sdn Bhd, the sub-contractor appointed by Glotel Sdn Bhd did not possess a licence to verify the safety and quality of the equipment, it was not qualified to verify the safety and quality of the said equipment.

Appeal No 812 — Berita Harian

Syarikat Allied Physics Sdn Bhd, subkontraktor dilantik Globel bagi mengiktiraf kualiti dan keselamatan PET CT Scan itu tidak berkelayakan atau memiliki lesen mengendalikan bahan radioaktif dan pengimejan seperti di bawah Seksyen 13(2) Akta Perlesenan Tenaga Atom.

(English translation)

Allied Physics Sdn Bhd, the subcontractor appointed by Glotel to certify the quality and safety of the PET CT Scan, was not qualified or licenced to handle radioactive material and imaging equipment as required under Section 13(2) Atomic Licensing Act.

Appeal No 813 — Sin Chew Daily

(English translation)

Tan Sri Dato' Ambrin said, Allied Physics Sdn Bhd, the subcontractor appointed by Globel Sdn Bhd was not qualified to verify the quality and safety of the

equipment because the said company did not possess the necessary licence to do so.

FINDINGS OF THE HIGH COURT

[11] In her oral judgment given on 31 March 2014, the learned judge dismissed the plaintiff's claim on three main grounds:

(a) the impugned publications were not defamatory of the plaintiff;

(b) the defences of justification and qualified privilege applied; and

(c) the defendants were not actuated by malice.

SUBMISSION OF PARTIES

[12] The first issue relates to the question of whether the impugned words in the publications are capable of bearing a defamatory meaning and are in fact defamatory. Learned counsel for the plaintiff submitted that the words in the AG's report and the synopsis of the AG's report were defamatory of the plaintiff as they imputed that:

(a) the plaintiff did not have the requisite licence to verify the quality and safety of the PET-CT Scanner;

(b) the plaintiff had no licence in the related field;

(c) the plaintiff did not have the requisite licence to carry out testing and certification on shielding of the PET-CT Scanner;

(d) the plaintiff had committed a criminal offence by failing to possess the requisite licence; and

(e) the plaintiff was dishonest in the way it carried on its business.

[13] First, learned counsel for the plaintiff submitted that DW1 (Penolong Pengarah Jabatan Audit Negara, Cawangan Audit Kesihatan) and DW2 (Ketua Penolong Pengarah Kanan Seksyen Keselamatan Sinaran) confirmed that the AG's report imputed that the plaintiff did not hold a licence to conduct certification of both the PET-CT Scanner and X-ray equipment. Further, the literal interpretation of the impugned words is that the plaintiff was not qualified to verify the quality and safety of the PET-CT Scanner and X-ray equipment (*Drummond-Jackson v British Medical Association and others* [1970] 1 All ER 1094 (CA), at p 1104).

[14] Second, it was argued that the impugned words imputed that the plaintiff did not have the licence to conduct safety certification on the PET-CT

Scanner. DW2 acknowledged that the word 'safety' in the AG's impugned words refers also to the certification of the building shielding the PET-CT Scanner.

[15] Thirdly, learned counsel argued that by imputing that the plaintiff required a licence under s 13(2) of Act 304 to conduct testing on PET-CT Scanner and X-ray equipment and did not possess such licence when testing was conducted, the plaintiff was imputed to have committed an offence under s 40 of Act 304 or had conducted its business in a dishonest and/or misleading manner.

[16] As against *The New Straits Times*, *Guan Ming Ribao Daily*, *Berita Harian* and *Sin Chew Daily*, learned counsel for the plaintiff argued that the impugned words in the respective newspaper publications inferred or imputed that:

(a) the plaintiff required a specific licence to carry out certification and testing of PET-CT Scanners;

(b) the plaintiff did not have the necessary licence to handle X-ray machinery;

(c) the plaintiff was not qualified to carry out testing on PET-CT Scanners and X-ray machinery;

(d) the plaintiff committed a criminal offence;

(e) the plaintiff had carried out its business in a dishonest manner; and

(f) the plaintiff did not possess a licence to certify X-ray equipment.

[17] Learned counsel for the plaintiff also submitted that the Class H licence was issued to Dr Ng Kwan Hoon and not to the plaintiff (reg 12 of the Radiation Protection (Licensing) Regulations 1986; s 40 Act 304). DW2 also confirmed that the impugned statements made by the auditor general were false and untrue. DW2 said that there was no specific licence for PET-CT Scanners at that time because it was new. As such, the current holders of Class H licence were permitted to conduct testing and certification of PET-CT Scanner. DW2 also agreed that the PET component of the PET-CT Scanner falls within the category of 'kemudahan-kemudahan berkaitan' within the express scope of the Class H licence.

[18] After hearing of learned counsel's submission on the issue of whether the impugned words in the publications are capable of bearing a defamatory meaning and are in fact defamatory, we indicated to the parties that we would like to hear the defendants' submission in reply to this threshold issue before proceeding with the remaining issues.

[19] Learned senior federal counsel ('SFC') for the auditor general submitted that the plaintiff's contention is that the impugned words meant that the plaintiff has no licence or is not qualified under s 13(2) of Act 304 to do certification of the quality and safety of the PET-CT Scanner. This point is true because DW1 and DW9 said that the plaintiff did not have a licence for PET-CT Scanner. DW5 explained that there are differences between a PET-CT Scanner and a CT Scanner and that the Class H licence only refers to CT scanner and not PET-CT Scanner.

[20] Further, learned SFC argued that the impugned words should not be read in isolation but the statements should be read as a whole and in its full context (*The Institute of Commercial Management United Kingdom v The New Straits Times Press (Malaysia) Bhd* [1992] MLJU 80; [1993] 2 CLJ 365; *Abdul Rahman bin Mamat lwn Zakaria bin Senik dan lain-lain* [2002] 7 MLJ 34). There is no suggestion that the plaintiff committed any criminal offence. Those statements were made for auditing purposes and improvisation of activities in the AG's report in lieu of the Ministry of Health.

[21] Learned SFC also submitted that publication of the AG's report and the synopsis of the AG's report must be considered in the light of the fact that (i) the powers given to the auditor general is enshrined under arts 106 and 107 of the Federal Constitution and the Audit Act 1958. Section 5 of the Audit Act 1957 sets out the duties of the auditor general to inspect, investigate and to audit; s 6 provides that the auditor general shall in his audit make such examination as he may deem necessary to ascertain, among others, whether in his opinion funds have been applied to the purposes for which they were appropriated or authorised and the activities related to such purposes were carried out or managed in an efficient manner (s 6(d)). In this connection, the auditor general is authorised to exercise the various powers enumerated under s 7 of the Audit Act 1957. After the inspection, investigation and audit have been completed, the auditor general will prepare a report known as the auditor general's report to be submitted to the Yang Di-Pertuan Agong and laid before the Dewan Rakyat in accordance with s 9 of the Audit Act 1957.

[22] Lastly, learned SFC submitted that the test to be applied when considering whether a statement is defamatory of a plaintiff is an objective one in that it must be given a meaning in which a reasonable man would understand it (*Ratus Mesra Sdn Bhd v Shaik Osman Majid & Ors* [1999] 3 MLJ 529; [1999] 8 CLJ 499). Therefore, a reasonable man in the society reading the statements would not see it as defamatory considering the circumstances and context as to the reason for its publication. A reasonable man would understand that the purpose and intention of the AG's report is meant for public interest and for the country. In no way can it be argued that it is published to tarnish the reputation of any party. PW2, the plaintiff's director

admitted that the purpose of the AG's report is to present the results and opinion of the audit, to point out any weakness and to improve the performance of the department.

[23] In reply, learned counsel for *The New Straits Times* and the *Berita Harian* submitted that the threshold issue should be determined by considering whether the words complained of in their natural and ordinary meaning are defamatory of the plaintiff. The test is whether under the circumstances in which the writing was published, a reasonable man to whom the publication was made, would be likely to understand it in a libellous sense. The test of reasonableness guides and directs the court in its function of deciding whether it is open to the jury in any particular case to hold that reasonable persons would understand the words complained of in a defamatory sense (*Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315). It is an undeniable fact that the Class H licence did not cover PET-CT Scanners and that the plaintiff did not have a licence for certifying and testing PET-CT Scanners. As such, learned counsel argued that the statements were not capable of being defamatory of the plaintiff.

[24] On behalf of *Guan Ming Ribao Daily* and *Sin Chew Daily*, learned counsel submitted that in order to determine the threshold issue the court should ascertain whether the impugned words are capable of bearing a defamatory meaning. If so, the next step is for the court to determine whether the impugned words are in fact defamatory (*Chok Foo Choo @ Chok Kee Lian v The China Press Bhd* [1999] 1 MLJ 371; [1999] 1 CLJ 461 (CA)). In this instance, the plaintiff is relying on s 40 of Act 304 to argue that it is an offence to practice without a licence and that the plaintiff is consequently conducting its business dishonestly. Learned counsel submitted that these are special facts which an ordinary reader would not know of. The impugned words read as a whole was referring to the lack of the requisite licence to certify the quality and safety of PET-CT Scanners only. There was no reference to any provision of the law which made it an offence to practise without a licence and there was no imputation that the plaintiff has contravened the law, has committed an offence or has carried on or is carrying on its business in a dishonest, misleading or deceptive manner by falsely representing to its customers that it is licensed and legally qualified to handle irradiating apparatus or related facilities as alleged by the plaintiff. No witnesses were called by the plaintiff to testify that they have understood the impugned words as having the meaning inferred by the plaintiff in its pleading which would certainly require the support of extrinsic facts passing beyond general knowledge which was not the plaintiff's pleaded case.

THRESHOLD ISSUE

Whether the words complained of are capable of bearing a defamatory meaning? If so, whether the words complained of are in fact defamatory

[25] In the first place the burden of proof is on the plaintiff to show that (i) the impugned words are defamatory, (ii) the impugned words refer to the plaintiff, and (iii) the impugned words were published (*Morgan v Odhams Press Ltd and another* [1971] 2 All ER 1156 at p 1179; *Ayob bin Saud v TS Sambanthamurthi* [1989] 1 MLJ 315 at p 323; and *Kian Lup Construction v HongKong Bank Malaysia Bhd* [2002] 7 MLJ 283 at p 284).

[26] In this instance it is not really disputed that the impugned words in question refer to the plaintiff and that they were published. Accordingly, we will consider the question of whether the impugned words are defamatory.

[27] In this process, the first step is for the court to determine *whether the words complained of are capable of bearing a defamatory meaning*.

[28] As a starting point, it is also instructive to refer to the three formulae set out in *Gatley on Libel and Slander* (12th Ed) at p 7 as follows:

(a) would the imputation tend to lower the plaintiff in the estimation of right-thinking members of society generally?

(b) would the imputation tend to cause others to shun or avoid the claimant? and

(c) would the words tend to expose the claimant to 'hatred, contempt or ridicule'?

[29] This is in essence a question of law that turns upon the construction of the words published (*Ayob bin Saud* at p 317; *Chok Foo Choo* at pp 466–467). The test according to the authorities is an objective test and it is whether, under the circumstances in which the words were published, reasonable men to whom the publication was made, would be likely to understand it in a defamatory or libellous sense (see *Gordon Berkeley Jones v Clement John Skelton* [1963] 1 WLR 1362; *Capital and Counties Bank Ltd v George Henty & Sons* (1882) 7 App Cas 741 and *Lee Kuan Yew v JB Jeyaretnam* [1979] 1 MLJ 281).

[30] In this regard, the legal principles relevant to meaning have been summarised by the English Court of Appeal in *Jeynes v News Magazines Ltd and another* [2008] EWCA Civ 130 (CA) as follows:

(a) the governing principle is reasonableness;

(b) the hypothetical reasonable reader is not naive but he is not unduly suspicious. He can read between the lines. He can read in an implication more readily than a lawyer and may indulge in a certain amount of loose thinking but he must be treated as being a man who is not avid for scandal and someone who does not, and should not, select one bad meaning where other non-defamatory meanings are available;

(c) over-elaborate analysis is best avoided;

(d) the intention of the publisher is irrelevant;

(e) the article must be read as a whole, and any 'bane and antidote' taken together;

(f) the hypothetical reader is taken to be representative of those who would read the publication in question;

(g) in delimiting the range of permissible meanings, the court should rule out any meaning which, 'can only emerge as the produce of some strained, or forced, or utterly unreasonable interpretation ...' (see Eady J in *Gillick v Brooke Advisory Centre* [2001] EWCA Civ 1263 at para 7 approved by this court and *Gatley on Libel and Slander* (10th Ed), para 30.6); and

(h) it follows that 'it is not enough to say that by some person or another the words *might* be understood in a defamatory sense': *Lord William Nevill v The Fine Art and General Insurance Company, Limited* [1897] AC 68; 61 JP 500; 66 LJQB 195 per Lord Halsbury LC at p 73.

[31] Accordingly, the words are to be taken in the sense that it is most natural and obvious. The ordinary and natural meaning of words may be either the literal meaning or it may be implied or inferred or an indirect meaning: any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning capable of being detected in the language used can be part of the ordinary and natural meaning of words (see *Lewis and another v Daily Telegraph Ltd; Same v Associated Newspapers Ltd* [1963] 2 All ER 151). The ordinary and natural meaning may therefore include any implication or inference which a reasonable reader guided not by any special but only by general knowledge and not fettered by any strict legal rules of construction would draw from the words.

[32] It is equally important to note that the context and circumstances of the publication must be taken into consideration, not only the actual words used (*Keluarga Communication v Normala Samsudin* [2006] 2 MLJ 700 (CA) at p 708).

[33] In order to determine whether the impugned words are capable of being defamatory, the AG's report must be read as a whole and in its full context. In this respect, the court should have regard to the fact that the AG's report was prepared in the performance of the statutory duties of the auditor general under the Audit Act 1957 and under the powers conferred by arts 106 and 107 of the Federal Constitution. Further, the AG's report is in the nature of a public document as the facts contained therein are of public interest and the statements are made by the auditor general in the course of his official duty.

[34] In this regard, it is also important to read the continuation of the text (set out below) where the auditor general made the comment on the fact that the plaintiff did not have the PET-CT scan licence:

> Semakan Audit mendapati Syarikat Allied Physics Sdn Bhd yang dilantik oleh pihak kontraktor untuk membuat pengesahan terhadap kualiti dan keselematan PET CT Scan tidak mempunyai lesen di bawah bidang berkaitan. Pada pandangan Audit, selaras dengan Seksyen 13(2) Akta 304, perakuan pengesahan terhadap kualiti dan keselamatan PET CT Scan yang dibuat oleh Syarikat Allied Physics Sdn Bhd boleh dipertikaikan.

[35] We agree with the submission of learned SFC that the keyword from the above extraction is that the certificate of authentication of the quality and safety of the PET-CT scan produced by the plaintiff is questionable ('boleh dipertikaikan'). The opinion of the auditor general is premised on the finding that the plaintiff did not have the requisite licence to certify the quality and safety of PET-CT scans. With respect, in the light of the aforesaid finding, the auditor general would be remiss in the discharge of his duties if the auditor general had omitted to state that fact in his audit report.

[36] Similarly, the reports pertaining to the AG's report published in *The New Straits Times*, *Guang Min Ribao Daily*, *Berita Harian* and *Sin Chew Daily* should also be read within the context and circumstances of the publication. In our respectful view, there is nothing in the AG's report and the newspaper publications which are capable of bearing a defamatory meaning.

[37] For the foregoing reasons, we agree with the learned judge that the impugned publications are not defamatory of the plaintiff. Accordingly, the five appeals were dismissed with costs.

Appeals dismissed with costs.

Reported by Dzulqarnain Ab Fatar